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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 918

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. 1a–4a) is reported at 350 F. 2d 791. The decision and order of the National Labor Relations Board (J.A. 2–25) [1] are reported at 150 NLRB No. 37.

JURISDICTION

The judgment of the court of appeals (Pet. 4a) was entered on July 16, 1965. A timely petition for re-

[1] "J.A." refers to the printed joint appendix in the court below.

hearing *en banc* was denied on October 7, 1965 (Pet. 5a). On December 28, 1965, Mr. Justice Douglas extended the time in which to file a petition for certiorari to and including January 17, 1966, and the petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act (29 U.S.C. 160(e)).

QUESTIONS PRESENTED

1. Whether a union, whose membership consists predominantly of persons who are employees within the meaning of Section 2(3) of the National Labor Relations Act, but which also includes individuals employed by an employer subject to the Railway Labor Act, is a "labor organization" for the purposes of the National Labor Relations Act when it engages in secondary boycott activities in a dispute with an employer subject to the Railway Labor Act.

2. Whether substantial evidence supports the Board's finding that two Railway Labor unions in this case acted as agents for labor organizations subject to the National Labor Relations Act.

STATUTES INVOLVED

The relevant statutory provisions are set forth at pp. 3–4 and 6a–20a of the petition.

STATEMENT

Petitioners and five other unions are the bargaining representatives of non-operating employees working on the Florida East Coast Railway (FEC). FEC is

a common carrier subject to the Railway Labor Act; it and its employees are therefore not within the definitions of "employer" and "employee" under Sections 2(2) and 2(3) of the National Labor Relations Act.

Two of the petitioners (Order of Telegraphers and Brotherhood of Maintenance of Way Employees)[2] are composed solely of railroad workers who are not "employees" under the NLRA (J.A. 16). The remaining four petitioners (IBEW, IAM, Boilermakers and Sheet Metal Workers)[3] are International unions which, while they represent some railroad employees, principally represent "employees" of "employers" under the NLRA (J.A. 11; 47–48). The number of railroad workers within each of the Internationals varies between 4,000 and 48,000; in comparative terms, the railroad workers comprise between 2½ and 8 percent of the total membership of each International (J.A. 11; 47–48). All the members of each International vote on and participate in all union matters in the same manner (J.A. 11; 47–52).

In 1961, petitioners, along with five other unions, formed a single organization, called the Cooperating Organizations, for the purpose of presenting unified

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[2] System Division No. 87, The Order of Railroad Telegraphers (now the Transportation Communication Employees Union); Brotherhood of Maintenance of Way Employees.

[3] International Brotherhood of Electrical Workers, AFL–CIO; International Association of Machinists, AFL–CIO; International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO; Sheet Metal Workers International Association, AFL–CIO.

contract demands to FEC and other railroads (J.A. 5; 31). All the railroads except FEC ultimately agreed to the terms of a new national contract, but FEC refused to be bound thereby. Separate negotiations with FEC subsequently proved unsuccessful (J.A. 5–6; 33–36).

On January 23, 1963, the Cooperating Organizations called a strike against FEC, which resulted in picketing along the FEC mainline (J.A. 6; 36–37). Each of the Cooperating Organizations participated in the strike and each furnished personnel to carry on the picketing (J.A. 14; 37). The Cooperating Organizations set up a "master strike team" to direct and coordinate all strike action (J.A. 14; 37). The master strike team in turn set up local strike teams for various geographic areas to arrange for picketing and other strike action in these local areas (J.A. 14; 37). The master strike team had final authority and control over, and was kept fully advised of, all picketing (J.A. 15; 65).

Shortly before the strike was called by the Cooperating Organizations, FEC and the National Aeronautics and Space Administration (NASA) entered into a contract pursuant to which FEC agreed to design, construct, operate, and maintain a spur line from the FEC mainline to points on and near the Merritt Island Launch Area and Cape Kennedy, Florida (J.A. 52).[4] On September 11 and 12, 1963, after work on the spur had commenced, the Cooperating Organizations

[4] The general geography of the area is shown by the map at J.A. 23.

picketed the Merritt Island area (J.A. 6; 57).[5] As a result of this picketing, employees of various contractors performing building and construction work pursuant to contracts with the United States Army Corps of Engineers refused to perform work for their employers at Merritt Island (J.A. 58).[6]

On February 10 and 11, 1964, after NASA announced that FEC would operate the newly constructed west spur, picketing was resumed at the Merritt Island Area.[7] Employees working for neutral employers and doing work unrelated to the construction or maintenance of the FEC spurs again refused to cross the picket lines (J.A. 61). On February 12, 1964, the picketing was halted by a temporary restraining order issued by a district court under Section 10(l) of the National Labor Relations Act (J.A. 7; 62). On June 8 to 10, 1964, picketing was resumed at some points and continued until again enjoined by the district court (J.A. 8; 66).

The Board found that, by their picketing at the Cape Kennedy-Merritt Island complex, petitioners had all engaged in secondary activity prohibited by

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[5] The signs carried by the pickets read (J.A. 7; 57):

Notice To The Public
F.E.C.R.R. Whose
Facilities Are Transporting
To This Project Refused To Bargain In Good Faith.
System Division No. 87, Order of Railroad Telegraphers.
We Have No Quarrel With Any Other Employer.

[6] Several of these contractors filed the unfair labor practice charges which form the basis of this proceeding.

[7] The pickets carried the same signs as in September 1963 (J.A. 7; see footnote 5, *supra*).

Section 8(b)(4)(B) of the National Labor Relations Act (J.A. 9–10; 16). As to the four Internationals (IAM, Sheet Metal Workers, and Boiler Workers), the Board found that these unions, which predominantly represented employees not subject to the Railway Labor Act, were "labor organizations" within the meaning of the National Labor Relations Act; as to the Telegraphers and Maintenance of Way Employees, which represented only railroad workers, the Board found that, while these unions were not "labor organizations" directly subject to the NLRA, they were engaged in a joint venture with, and hence were agents of, the four Internationals (J.A. 11–16). Accordingly, the Board concluded that all petitioners had violated Section 8(b)(4)(B) of the Act (J.A. 16). The Board ordered petitioners to cease and desist from the unfair labor practices found and to post appropriate notices (J.A. 18–19).

The court of appeals sustained the Board's findings and enforced its order (Pet. 1a–4a). Chief Judge Bazelon dissented as to the Telegraphers and Maintenance of Way Employees on the ground that a joint venture with the other petitioners had not adequately been shown (Pet. 3a–4a).

ARGUMENT

Section 8(b)(4)(B) of the National Labor Relations Act, under which petitioners here were charged, makes it an unfair labor practice for a "labor organization or its agents" to engage in certain secondary boycott activity. All petitioners in this case, in furtherance of a primary dispute with Florida East

Coast Railway, engaged in such prohibited secondary activity at the Merritt Island Launch Area and Cape Kennedy. Petitioners contend, however, that this activity was not an unfair labor practice under Section 8(b)(4)(B) because FEC, with whom petitioners had their primary dispute, is an employer covered by the Railway Labor Act and therefore not an "employer" under the National Labor Relations Act.

In response to this contention both the Board and the court of appeals held that the determinative question was not whether the primary employer against whom the secondary action was directed was an "employer" under the National Labor Relations Act but rather whether the unions charged with unlawful secondary activity were "labor organizations" subject to the restrictions of that Act. In our view, this decision as to the relevant criteria for the application of the NLRA was correct. Nor is there occasion for the Court to review further the factual determination that all the petitioners here were subject to the NLRA—the four Internationals as "labor organizations" and the two remaining petitioners as "agents" of such "labor organizations."

1. Section 2(5) of the National Labor Relations Act defines a labor organization as "any organization * * * in which employees participate." Under Section 2(3), an "employee" is "any employee [except] * * * any individual employed by an employer subject to the Railway Labor Act." Four of the petitioners in this case (IBEW, IAM, Boilermakers, and Sheet Metal Workers) are organizations predom-

inantly representing non-railway "employees." Under the terms of the NLRA, these petitioners were therefore "labor organizations." It is not relevant that these Internationals did not exclusively represent "employees" covered by the NLRA. As all of the courts of appeals which have had occasion to consider the question have concluded, an entity is a "labor organization" subject to the regulation of the NLRA if "employees" participate in that organization, regardless of whether they are the exclusive participants. *National Marine Engineers Beneficial Association* v. *National Labor Relations Board,* 274 F. 2d 167 (C.A. 2); *International Organization of Masters, Mates and Pilots* v. *National Labor Relations Board,* 48 LRRM 2624, enforced after remand, 351 F. 2d 771 (C.A.D.C.). See *Marine Engineers Beneficial Ass'n.* v. *Interlake Steamship Co.,* 370 U.S. 173, 184, n. 22.[8]

Section 8(b)(4)(B), moreover, contrary to petitioners' argument (Pet 9–14), clearly does not require that the primary dispute be with an "employer" sub-

[8] *Di Giorgio Fruit Corp.* v. *National Labor Relations Board,* 191 F. 2d 642 (C.A.D.C.), certiorari denied, 342 U.S. 869, is not to the contrary. The court there affirmed the Board's dismissal of the complaint against Farm Union because that union was composed *exclusively* of agricultural employees not covered by the NLRA (191 F. 2d at 644). Thus, Farm Union, unlike the four Internationals here, was not a "labor organization." Significantly the court found that National Union, the parent of Farm Union, was a labor organization within the meaning of the Act, for it did include "as members workers other than agricultural laborers"; however, the court found that there, unlike here, the evidence was insufficient to show that Farm Union had acted as its agent (*id.*, at 647–648).

ject to the NLRA in order for its prohibitions to be applicable. Section 8(b)(4)(B) prohibits specified secondary activity by a labor organization where the purpose is to require "any person" to cease doing business with "any other person"—not merely with "employers" covered by the Act. "Person" is broadly defined in Section 2(1) to include all "individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers," regardless of whether such persons are "employers" under the NLRA. Thus, the NLRA in terms does not exempt unlawful secondary activity merely because it is connected with a primary dispute with a Railway Labor Act employer. Railroads and their employees were exempted from the definitions of "employer" and "employee" under the NLRA to avoid conflicts caused by inconsistencies between the detailed provisions of the Railway Labor Act and the NLRA rules covering labor-management relations. There is no warrant for reading into the Railway Labor Act an additional implied exemption—inconsistent with the express language of the statute—for unlawful secondary conduct engaged in by a "labor organization" where the conduct concerns a primary dispute with a railroad. See *Local Union No. 25, Teamsters* v. *New York, New Haven & Hartford R.R.*, 350 U.S. 155; *W. T. Smith Lumber Co.* v. *National Labor Relations Board*, 246 F. 2d 129 (C.A. 5).

2. Section 8(b) applies to conduct by a "labor organization or its agents." Having found that the

four International union petitioners were "labor organizations" which had violated Section 8(b)(4)(B), the Board also found that the two remaining petitioners—Order of Telegraphers and Brotherhood of Maintenance of Way Employees—were "agents" of the Internationals (J.A. 15–16). The court of appeals affirmed this determination.

There is no occasion for further review here of the particular factual circumstances underlying this holding. The evidence fully supports the conclusion that the Telegraphers and Maintenance of Way Employees were engaged in a joint venture with the four Internationals in respect to the strike against Florida East Coast Railway and the ensuing secondary picketing.[9] Such joint venturers can properly be viewed as both principals for themselves and as agents for their coventurers. See 48 C.J.S. 827; Restatement, Torts, § 876; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U.S. 229, 249; *International Organization of Masters, Mates*

[9] As the Board pointed out (J.A. 15):

> In this case, all [Petitioners] were members of Cooperating Organizations which called and managed the strike against FEC in their common behalf. That organization, through its master and local strike teams, had final control of and authority over all the picketing. Pickets were actually placed and supervised by members of the local strike teams. Although picket signs used after September 11, 1963, carried the names of either Telegraphers or Maintenance of Way Employees as sponsor of the picketing, it is apparent, and we find, that these pickets were acting in behalf of all the striking unions and in furtherance of their common objective to win the strike against the FEC * * *.

and Pilots v. *National Labor Relations Board*, 351 F. 2d 771, 777–778 (C.A.D.C.)

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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